

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

In re: :  
PALMIERI, : Docket #20-cv-02663-  
 : RA-BCM  
 :  
Plaintiff, :  
 :  
- against - :  
 :  
EAST COAST POWER & GAS, LLC, et al., : New York, New York  
 : November 24, 2020  
Defendants. :  
 : TELEPHONE CONFERENCE  
----- :

PROCEEDINGS BEFORE  
THE HONORABLE JUDGE BARBARA C. MOSES,  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff: LAW OFFICES OF MICHAEL D. STEGER, PC  
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<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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None

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2 THE CLERK: This is case number 20-cv-2663,  
3 Vincent Palmieri v. East Coast Power & Gas, LLC et al.

4 Counsel, please state your appearances for the  
5 record and please spell your names, beginning with the  
6 plaintiff?

7 MR. MICHAEL STEGER: Good morning, your Honor.  
8 Michael Steger, S-t-e-g-e-r, Law Offices of Michael D.  
9 Steger, for plaintiff, Vincent Palmieri.

10 HONORABLE BARBARA C. MOSES (THE COURT): Good  
11 morning, Mr. Steger.

12 And for East Coast?

13 MR. TREVOR GOMBERG: And good morning, your Honor.  
14 For the defendants, Levitt LLP appearing by Trevor Gomberg.  
15 That's G-o-m-b-e-r-g, 129 Front Street, Mineola, New York.  
16 And good morning, your Honor.

17 THE COURT: Good morning, Mr. Gomberg.

18 I have read your joint letter dated the 19th.  
19 Thank you very much. I'd like to get right to the, what I  
20 understand to be the main issue before me today, which is  
21 the discoverability of one of the individual defendant's  
22 testimony during his divorce action to the extent that  
23 testimony directly concerns plaintiff, Mr. Palmieri. I'll  
24 just pause there to give you an opportunity to tell me that  
25 you've resolved that question and don't need judicial

1 resolution. Always hopeful.

2 MR. STEGER: It's Michael Steger, your Honor.  
3 Unfortunately, we have not resolved that issue.

4 MR. GOMBERG: If I may be heard briefly, your  
5 Honor, because it might shortcut some of this. This is  
6 Mr. Gomberg for defendants.

7 THE COURT: Go ahead, Mr. Gomberg.

8 MR. GOMBERG: Thank you, your Honor.

9 Part of the reason for that, your Honor, is we  
10 don't believe that the domestic relations law statute  
11 permits a party to give these documents voluntarily. We  
12 believe these are shrouded in a private proceeding; and so,  
13 therefore, we don't think that there is that discretion to  
14 turn over documents because they are subject to that  
15 statute.

16 What we think is more concerning to us is the  
17 circumstances under which Mr. Steger obtained the  
18 information that he's using to make this request. And it  
19 was information that was, so Mr. Steger tells me,  
20 information sent from the attorney for the spouse in that  
21 matrimonial proceeding. So there are also issues because  
22 there's a Protective Order in that action.

23 So we think that there are some concerns about  
24 whether that information should have been given in the  
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first place. We would, frankly --

THE COURT: Hold up one minute, Mr. Gomberg.

Did someone just join us or leave us, Ms.

Dennett?

THE CLERK: I think we're okay. It looks like we have both Mr. Gomberg and Mr. Steger still on the line, and no one has joined.

THE COURT: All right. I just heard the beeping that generally means we've lost somebody or gained somebody.

THE CLERK: Yes. For whatever reason, Mr. Steger had two lines that were showing up on the conference monitor, but I think that's what happened. But we're okay.

THE COURT: All right, go ahead, Mr. Gomberg.

MR. GOMBERG: If Mr. Steger is still there -- I want to make sure he didn't drop off.

MR. STEGER: I'm -- no, I'm --

MR. GOMBERG: I just have one more thing to say.

MR. STEGER: -- I'm still here.

MR. GOMBERG: Okay. All right. Your Honor, I don't want to belabor this. And if your Honor is leaning in a particular way, which it sounds like your Honor is, I certainly -- you know, if your Honor is inclined to order production over our objections -- and I don't mean to

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2 retread those, which are stated in the letter,  
3 Mr. Steger's proposal is reasonable. You know, in that  
4 case, we would work with divorce counsel to, I suppose,  
5 redact or obscure everything other than the, as your Honor  
6 couched it, what directly concerns the plaintiff.

7 But we are concerned about the circumstances under  
8 which plaintiffs became aware of this. We think that  
9 that's an issue. We frankly liken it to a suppression  
10 analysis, but I don't want to stand in the way of progress.  
11 And we'll defer to the Court's direction.

12 THE COURT: All right. Anything to add,  
13 Mr. Steger?

14 MR. STEGER: I think it may be more helpful if  
15 your Honor has questions, I could address them.

16 THE COURT: All right, well, the ruling of the  
17 Court, then, will be as follows. I've looked at the  
18 domestic relations law, New York Domestic Relations Law  
19 Section 235, and I note that it does not create a  
20 privilege. It does create, it does set up certain  
21 confidentiality rules with an exception for a court order.  
22 The New York state courts, when confronted with similar  
23 questions here, i.e., whether testimony taken in  
24 matrimonial proceedings or pleadings or other matters in a  
25 matrimonial file should be discoverable in other cases

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2 have imposed a heightened relevance requirement but have  
3 not forbidden the discovery entirely. And there are a  
4 number of cases in the state courts which have under  
5 circumstances somewhat similar to the circumstances here  
6 held that the contents of a matrimonial file are  
7 sufficiently relevant so as to require that they be  
8 produced, often under various confidentiality stipulations  
9 in otherwise unrelated litigation.

10           It's not at all clear to me whether the New York  
11 state standards here were intended to be or court be  
12 binding on a federal court, but I need not determine that  
13 issue today. Even applying the state standards, I would  
14 find here that there is a very clear need for the  
15 documents, that a heightened relevancy standard is met to  
16 the extent that the matrimonial file contains testimony in  
17 which defendant Milanese speaks expressly and directly  
18 about the very issue which is central here, namely, whether  
19 the plaintiff is or is not responsible for adverse  
20 financial events concerning the company. I think he is  
21 absolutely entitled to those portions of the matrimonial  
22 testimony, so I will order that they be turned over.

23           I would add that the request here, which is for  
24 the portions of the testimony dealing with the financial  
25 relationship of the plaintiff to East Coast Power & Gas

really does not implicate the policy issues behind Section 235, the policy goals of Section 235. And the policy goals of Section 235 are to protect private and sometimes embarrassing details regarding the parties' personal life and sometimes their personal financial life. But the plaintiff here is not interested in Mr. Milanese's personal financial circumstances and certainly does not appear to be interested in his personal life, that is, his relationship with his spouse. He is only interested in what Mr. Milanese said about East Coast Power & Gas and particularly what Mr. Milanese said about the plaintiff's responsibility for the current financial condition of East Coast Power & Gas, and he is entitled to that.

So I will require that those portions of the matrimonial testimony be produced. Are the parties in a good enough -- are the parties working well enough so that you can determine between yourselves without further judicial supervision what needs to be redacted and what needs to be produced consistent with the ruling I just gave you?

MR. GOMBERG: Speaking for defendants -- this is Mr. Gomberg -- I believe on our side we are comfortable resolving this matter with Mr. Steger.

THE COURT: All right, is there a confidential



1 stip and order in this case?

2 MR. GOMBERG: There is, your Honor.

3 MR. STEGER: Yes, your Honor.

4 THE COURT: All right, so between the good faith  
5 of the two able counsel that I have on the phone and the  
6 availability of the confidential order to prevent any  
7 further transmission of information from the matrimonial  
8 file, I think you ought to be in reasonably good shape on  
9 this one.  
10

11 Now, with regard to the iPhone, which was the  
12 other issue that you mentioned in your joint letter, it  
13 doesn't sound to me like there is an actual motion before  
14 me at the moment. I understand that the defendant is  
15 frustrated -- I understand that the defendants, I should  
16 say, are frustrated and perhaps a little skeptical that the  
17 plaintiff can't remember his iPhone password. Most -- and I  
18 understand that -- most human beings, certainly Judge  
19 Moses included, either recycle the same two or three  
20 passwords all the time which they can remember, which  
21 security experts warn us not to do but we do anyway  
22 because we're human, or else we write them down somewhere.  
23 I get that. But you can't get blood from a stone; and if  
24 the man says in sworn interrogatory answers that he can't  
25 remember how he unlocked his iPhone, I think you have to

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live with that for now. And you can certainly grill him at deposition, and I'm sure you will.

Am I missing anything there?

MR. GOMBERG: Well, your Honor, just as a point of clarification, this was the subject of our initial letter motion at Document 36 --

THE COURT: I remember. And I --

MR. GOMBERG: -- I'm seeking -- that's right.

THE COURT: -- I required the plaintiff to amend, which I see that he did. And in his amended response he says he didn't unlock the phone using any biometric, and he's looked in various places, his garage and so forth, and he can't find the password.

So it is what it is, right? For now.

MR. GOMBERG: It would appear that way, your Honor.

THE COURT: All right, you know, if you should find out that he was holding back on you, I'm sure I'll hear about it.

MR. GOMBERG: Thank you, your Honor.

THE COURT: Anything else for today, gentlemen?

MR. GOMBERG: Your Honor, if I may be heard on one discrete issue, it's sort of -- this is Mr. Gomberg speaking again. And this does kind of dovetail with -- and

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I certainly don't want to backtrack off the progress that Mr. Steger and I have made in meet-and-confer concerning the party discovery issues -- it's more of a housekeeping issue that dovetails with both the discovery and the substantive case issues. At the last conference Mr. Steger raised that there were certain issues concerning tax returns and a K-1 that his client, the plaintiff, had received. I've just been informed that defendants, after having paid substantial sums in tax payments, in the hundreds of thousands of dollars on plaintiff's behalf, now potentially there's going to be a refund of these monies, since the company actually lost money. So what that means, your Honor, is that instead of this money going back to the company, the refund would be going potentially to the plaintiff directly. But in fact, this is the company's money paid on the plaintiff's behalf. So obviously, it's our position --

THE COURT: Well, I think --

MR. GOMBERG: -- that the money should be returned to the company. But we'd ask for a direction, your Honor, that if there are any monies returned, that as not to complicate the case issues any further, that they be escrowed by plaintiff's counsel, given the claim of right by the defendants, your Honor.

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THE COURT: Well, explain that to me a little better. This is an LLC, correct?

MR. GOMBERG: It is, your Honor.

THE COURT: And because it's an LLC, it's a passthrough for tax purposes, correct?

MR. GOMBERG: It is, your Honor. It's a little bit more complicated than that. And this is -- these are taxes that were paid on plaintiff's behalf on income that the company generated. So as a result --

THE COURT: Why -- let me just stop you there, because I heard you say that but I don't understand that. Why did the company, the LLC, pay taxes on plaintiff's behalf? Normally what would happen with an LLC is that the plaintiff and every other member of the LLC would get a K-1, and he would submit that K-1 to the IRS along with all of his other tax documents. And to the extent the K-1 showed taxable income, he'd owe tax on it, right?

MR. GOMBERG: That could be, your Honor. I don't pretend to be a tax attorney, and so I don't want to speak with authority on this specific issue. I think it would be irresponsible for me to do so. And I can't speak to why the company made a business decision to pay those monies on the plaintiff's behalf. I believe there's some contractual basis for that, but that's perhaps a longer explanation,

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although I'd be happy to provide that to your Honor if your Honor is interested in it. But the short of it is that these monies were -- it's our position these are company monies, that because the IRS doesn't look at the payor but rather looks at the taxpayer, that the taxpayer, the plaintiff, would be poised to potentially receive those monies in the form of a refund because of the losses sustained by the company.

THE COURT: How much money are we talking about?

MR. GOMBERG: We're talking about over \$250,000, your Honor.

THE COURT: Two hundred and fifty thousand dollars that would come back personally to the plaintiff?

MR. GOMBERG: Actually, I believe it's \$265,000, your Honor, that would come back potentially personally to the plaintiff.

THE COURT: And the plaintiff, what was the plaintiff's -- what either was or is, depending on who I'm talking to, the plaintiff's membership share in the LLC?

MR. GOMBERG: Ten percent, your Honor, and remains so --

THE COURT: Ten percent. So that means that there's 2.6 million bucks coming back overall, most of which is going to the individual defendants, right?

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MR. GOMBERG: I don't know that to be the case, your Honor. I believe it would be going back to the company. There's significant debt, and that would probably be going to pay the bank, pay secured creditors. I don't know --

THE COURT: Well, the IRS --

MR. GOMBERG: -- I don't know that --

THE COURT: -- the IRS does not send refund checks to people's creditors, as you've just told me the IRS --

MR. GOMBERG: Oh, I understand, your Honor. I didn't mean to shortcut that, your Honor.

THE COURT: Right. So you're saying, I think, that there's approximately 2.6 million bucks coming back to the members of East Coast Power & Gas, LLC, from the IRS, which will be refunded to the individual members, who are the taxpayers, in proportion to their membership interests, correct?

MR. GOMBERG: I can't speak definitively to that. I only know what I've informed your Honor, although your Honor's -- I agree with your Honor's math.

THE COURT: Okay. Well, that's a start.

Now, is this new news to Mr. Steger, or did you know about this, Mr. Steger?

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MR. STEGER: This is new news to me, your Honor.  
I had not heard of it before now.

THE COURT: Okay. All right. Well, look, what  
I'm about to say hopefully will not shock anybody. It's  
new news to me. It's been presented only orally by  
Mr. Gomberg whose good faith I obviously don't question  
but whose grasp of all of the necessary details I do  
question at this stage. I haven't heard enough about  
anything to give you any kind of ruling or guidance on  
this. You need to find out what's actually going on,  
Mr. Gomberg, and you do need to talk to Mr. Steger about  
it. And if the facts are as you suggest that they are,  
some kind of escrow arrangement might make sense. But I  
just don't have enough information to give you any kind of  
guidance at present.

MR. GOMBERG: Thank you, your Honor.

THE COURT: Should we set a time for talking  
about that, or should I leave it to the parties --  
counsels' common sense to ask for a conference when and if  
you need one? You know where to find me.

MR. STEGER: I think the latter makes more sense,  
your Honor.

THE COURT: All right.

MR. GOMBERG: And I do, as well, your Honor. I

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think your guidance and suggestion might be all that's required at this juncture.

THE COURT: Well, let's hope so.

All right, so the only ruling today, then, will be with regard to the matrimonial testimony. The plaintiff is entitled under reasonable confidentiality sections to the portions of Mr. Milanese's testimony, whether at trial or at deposition during his divorce proceedings, concerning the financial condition of East Coast and in particular the plaintiff's responsibility for that financial condition.

Not knowing what's in the divorce file and just thinking out loud, which is always dangerous, I don't know if there are also written statements, affidavits, what have you, that should be included in the order. Who can tell me the answer to that?

MR. STEGER: Your Honor, that's -- Michael Steger for the plaintiff -- we request that the order include any affidavits or declarations, as well.

THE COURT: I think that makes sense because that's really just a form of written testimony. So any testimony, whether in the form of the written statement or in the form of oral testimony given in court or at depositions. All right?

MR. GOMBERG: And, your Honor, that would be, of



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course, limited to either the substance that your Honor had laid out earlier that directly concerns the plaintiff?

THE COURT: Well, you know, let's be sensible about this gentlemen. I don't want you to turn over the three lines of testimony where -- I'm going to make up the following facts for illustration. I don't want you to turn over merely the three lines of testimony where Mr. Milanese says, "Yeah, and all that stuff I just told you, it's Mr. Palmieri's fault," without including all that stuff I just told you.

MR. GOMBERG: I understand. I just --

THE COURT: Did --

MR. GOMBERG: Sure. And just by way of illustration, your Honor, I mean, there are -- you know, in the investigation that I was able to do into this matter to be able to speak intelligently, there are voluminous -- some voluminous affidavits, a very small portion of which concern the plaintiff. So I think that, you know, we wouldn't -- it sounds like we wouldn't be talking about production of, of course, the entire thing, much of which is not relevant to the issues or to the plaintiff.

THE COURT: I think the devil is going to be in the details here. I think you both understand in theory where the line is to be drawn. The order, the production

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order, extends to things that Mr. Milanese said about Mr. Palmieri's relationship to and responsibility for the financial condition of East Coast Power. You need to produce enough context so that Mr. Milanese's statements about Mr. Palmieri actually make sense.

MR. GOMBERG: Understood, your Honor.

THE COURT: You don't need to produce materials having nothing to do with the financial condition of East Coast Power or with the plaintiff's relationship to that financial condition. Okay?

MR. GOMBERG: Understood, your Honor.

MR. STEGER: Thank you, your Honor.

THE COURT: I think we've gone as far as we can go today. I will talk to you as such time as you need me. We will be adjourned.

MR. GOMBERG: Thank you, your Honor.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Palmieri v. East Coast Power & Gas, LLC et al, Docket #20-cv-02663-RA-BCM, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: December 14, 2020